State of Wisconsin / OFFICE OF THE COMMISSIONER OF INSURANCE

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Sean Dilweg, Commissioner

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Testimony on Assembly Bill 701
Sean Dilweg, Commissioner of Insurance
Before the Assembly Committee on Insurance
February 11, 2010

Thank you, Representative Cullen and members of the Committee on Insurance, for scheduling and conducting this hearing on this necessary piece of legislation.

Assembly Bill 701 (AB 701) is a package of corrections and clarifications to the Wisconsin insurance statutes that are necessary to provide guidance for insurers and consumers. The bill also repeals statutes that are obsolete. AB 701 clarifies recent changes in auto insurance requirements. The bill also updates Wisconsin Insurance Security Fund (WISF) statutes, and reflects technical corrections to the Long-Term Care Partnership Program, and the American Recovery and Reinvestment Act subsidy program.

AB 701 updates statutes affecting charitable gift annuities, mutual and fraternal insurers. The bill also makes changes to agent reinstatement fees and establishes a fee for electronic agent license applications.

Specifically, the bill will repeal the Interstate Insurance Receivership Compact (Compact). This compact is dissolving and the statutes that created the compact are no longer necessary. The bill also repeals the definition of "impaired insurer" in Chapter 646, which is not used anywhere in Chapter 646.

The bill will change the Commissioner's authority to determine an insurer's participation or non-participation in HIRSP assessment. The change requires the Commissioner to conduct a public hearing before prior to excluding an insurer from the assessment.

AB 701 will establish reciprocity for qualified Long Term Care Partnership policies purchased outside of Wisconsin. Under the Partnership Program, participants with qualified long-term care insurance policies retain a portion of their assets for the purposes of Medicaid eligibility determination and are able to protect those assets from estate recovery. The reciprocity language will enable new Wisconsin residents who purchased their long-term care insurance policy while living in another state to participate in the Partnership Program.

AB 701 will make two changes to agent fees that are administered by OCI. Under current law, an insurance agent whose license is revoked for reasons such as failure to comply with continuing education requirements or paying renewal fees on time, may have the license reinstated if he or she satisfies the original deficiencies and pays the

an amount equal to the original license application fee for a total of $150 per line of authority. This bill requires that an agent seeking reinstatement of a license pay twice the amount of the license renewal fee for a total of $70 per line of authority This change reduces the amount that an agent will have to pay for reinstatement, which has proven to be burdensome for agents. AB 701 also implements an electronic application fee of $10 to be paid by new license applicants for filing an original electronic resident intermediary license application following completion of prelicensing requirements. The combination of these changes is expected to have a minimal impact on overall agency revenues.

AB 701 gives the Commissioner rulemaking authority to establishing standards requiring insurers to provide continuation of coverage for any individual covered at any time under a group policy who is a terminated insured, or an eligible individual under any federal program that provides for a federal premium subsidy for individuals covered under continuation of coverage under a group policy. This change will give me permanent authority to enact federal changes in the American Recovery and Reinvestment Act as they relate to health care subsidies on the state level so that there is seamless coverage for all Wisconsin employees who wish to take advantage of the 65% premium subsidy. This subsidy has proved popular and the federal government has been inclined to make additional changes and extensions. With this change, the statutes anticipate future changes to the program. 2009 Wisconsin Act 11 created the initial authority for OCI to adopt rules to implement this program.

AB 701 makes technical clarifications to fraternal and mutual governance statutes by permitting fraternal insurance organization to elect its directors by voting by electronic means or another method that is approved by the fraternal insurer's board of directors in its bylaws. The bill also clarifies that members of a merging town mutual and an assessable domestic mutual each have the right to vote on the plan of merger once the merger has been approved by the Commissioner.

AB 701 provides that enrollees under a policy issued under Part C or Part D of Medicare are not liable for health care costs that are covered under such a policy providing prepaid or fee-for-service health care or drug benefits. This change protects senior citizen insureds under Medicare Advantage and Medicare drug policies from being billed for charges covered under the policy.

AB 701 makes a number of technical changes to the Wisconsin Insurance Security Fund (Fund) statutes. The bill will exclude Fund coverage for Medicare Parts C (Medicare Advantage) and D (senior drug coverage) in the same manner as coverage under the managed care Medicare Advantage plans and plans developed between insurers, the Wisconsin Department of Health and Family Services and the Centers for Medicare and Medicaid Services on the Medicaid side are excluded. Senior policyholders will not be held liable for any unpaid claims under this change.

The bill will give the Fund the ability to terminate its defense of a claim, if consistent with the policy terms, without the requirement to secure the insured's release. This is consistent with the NAIC Property and Casualty Insurance Guaranty Association Model Act. This provision would permit the WISF to be dismissed from an action and

all liability to the insured once the WISF had paid or tendered for payment the policy limits in the same way that the insurer would have been dismissed under similar circumstances.

The bill creates a general exclusion for claims that arise out of business that cannot be assessed because of federal or state law. This also conforms with the NAIC model guaranty association acts. The guaranty association system is based on the premise that all insurers who are members of the guaranty association in a particular state, i.e., those insurers whose policyholders will be protected by the guaranty association in the event of insurer insolvency, will be assessed to pay the claims of insolvent insurers. The simple premise is that if an insurer's policyholders are protected by the WISF, the insurer must pay assessments to the WISF for the claims of other insolvent insurers. This amendment provides that there is no coverage if there is a state or federal law that prohibits the WISF from assessing to pay the claims.

AB 701 will clarify that the $300,000 cap "on a single risk, loss or life" applies regardless of the number of policies or contracts. This is a clarification of the language and conforms to NAIC model guaranty association act language.

AB 701 increases the net worth threshold from $10,000,000 to $25,000,000 for both first-party claims and third-party claims. This creates a minimum $2.5 million exclusion (actual exclusion is calculated based on 10% of the insureds net worth) from fund coverage for claims filed by insureds with a net worth of $25 million or more. There is no exclusion for insureds with a net worth of less than $25 million.

The bill adds more detail to the claims appeal process and the assessment appeal process and place WISF processes into statute. This provision gives claimants a better roadmap to appealing a WISF claim decision because it puts the procedure in the statute. The bill also deletes the reference to Chapter 76 procedures for collection of assessments to accurately reflect the WISF procedures.

AB 701 makes a number of changes to auto insurance statutes to clarify the applicability of changes in the statutes passed earlier this session. Specifically the bill addresses the following concerns:

- Exempting primary and umbrella/excess policies that have only hired and non-owned exposure from the uninsured motor vehicle (UM), the uninsured motor vehicle (UIM) and medical payments coverage in s. 632.32(4) Wis. Stat. and the umbrella/excess UM and UIM offer requirements in s. 632.32(4r) Wis. Stat.

- Exempts umbrella and excess polices from the offer of medical pay coverage. The current provisions may be interpreted as requiring inclusion of medical pay coverage in umbrella and excess policies unless the coverage is rejected. The proposal would add a statement that such an offer and rejection is not required for umbrella and excess policies.

- Clarify that (a) that a motor vehicle which is self-insured under motor vehicle financial responsibility law does not fall within the definition of uninsured motor vehicle, and (b) that a motor vehicle that is owned by a governmental unit or agency does not fall within the definition of uninsured motor vehicle.

- Clarify that (a) that a motor vehicle which is self-insured under motor vehicle financial responsibility law does not fall within the definition of underinsured motor vehicle, and (b) that a motor vehicle that is owned by a governmental unit or agency does not fall within the definition of underinsured motor vehicle. This change will extend the definition of underinsured motor vehicle for a situation where the motor vehicle has proof of financial responsibility at the required limits but those limits are not enough to cover the damages.

- S. 632.32(4r) Wis. Stat. uses the term "named insureds" in reference to who may reject coverage for UM/UIM in umbrella or excess liability policies. The language clarifies that if one named insured rejects coverage that named insured acts on behalf of all named insureds.

- Clarify that a trailer or semi-trailer does not need a separate policy and only a single policy with a single set of liability and UM/UIM limits on the motor vehicle is required. Those limits will extend to the trailer if the trailer is connected at the time that an insured event occurs.

These changes to the auto insurance statutes will provide a clearer direction to insurers and reduce confusion about the changes implemented last year.

I wish to thank Representative Cullen and Senator Taylor for introducing this legislation. I thank the Committee for the opportunity to have this hearing and I would be happy to address any questions that you have.

WCLI

Wisconsin Council of Life Insurers
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Phone: 608-251-1968

TO: HONORABLE MEMBERS OF THE ASSEMBLY INSURANCE COMMITTEE

FROM: CONNIE L. O'CONNELL
WISCONSIN COUNCIL OF LIFE INSURERS

SUBJECT: ASSEMBLY BILL 701 – OCI TECHNICAL BILL

DATE: FEBRUARY 11, 2010

The Wisconsin Council of Life Insurers, an organization representing both domestic and nondomestic life insurance companies licensed in Wisconsin, strongly supports Assembly Bill 701 relating to technical changes requested by the Office of the Commissioner of Insurance.

AB 701 includes two provisions of particular interest to the life insurance industry. The first is a technical correction to language adopted last session providing for Wisconsin's participation in the Long-Term Care Partnership Program. Under this program, individuals who purchase long-term care insurance policies that meet certain federal requirements can apply for Medicaid under special rules for determining financial eligibility and Medicaid estate recovery. The original bill had an error that did not provide the appropriate statutory authority for the Department of Health Services to enter into reciprocity agreements in order to allow individuals who purchase a Partnership Policy in one state to move to another state with a Long Term Care Partnership Program without losing the asset protection. The technical bill corrects this error.

We also support the provision in the technical bill that will make it easier for more members of fraternal benefit societies to participate in their society's election and governance. AB 701 allows fraternal members to vote by electronic or other means, not just paper ballots, when they vote to elect their board of directors.

We respectfully request your support for AB 701. Do not hesitate to contact us if you have any questions or comments.

WISCONSIN ASSOCIATION *for* JUSTICE

Testimony of Joseph Strohl
on behalf of the
Wisconsin Association for Justice
before the
Assembly Insurance Committee
Rep. David Cullen, Chair

2009 Assembly Bill 701
February 11, 2010

My name is Joseph Strohl. I am the Legislative liaison for the Wisconsin Association for Justice (WAJ). While Assembly Bill 701 covers a number of areas related to insurance, I am here to register WAJ's objection to one – the changed definition of underinsured motorist vehicle, which excludes coverage if you are hit by a government-owned vehicle.

Prior to the passage of 2009 Act 28, there was no statutory definition of underinsured motorist vehicle or underinsured motorist insurance (UIM). However, the coverage has always been something consumers buy from their own insurance company to protect themselves and their family from accidents involving other drivers without adequate insurance.

Courts had identified "The purpose of underinsured motorist coverage is to compensate an insured accident victim when the insured's damages exceed the recovery from the at-fault driver (or other responsible party)." *Badger Mutual Insurance Co. v. Schmitz, et al.*

As adopted by 2009 Act 28, an underinsured motorist vehicle is broadly defined to meet this purpose –

> 632.32 (2)(e) "Underinsured motor vehicle" means a motor vehicle to which all of the following apply:
>
> 1. The motor vehicle is involved in an accident with a person who has underinsured motorist coverage.

2. A bodily injury liability insurance policy applies to the motor vehicle at the time of the accident.

3. The limits under the bodily injury liability insurance policy are less than the amount needed to fully compensate the insured for his or her damages.

The proposed change – to exclude government-owned vehicles from this definition – is not sound public policy. We believe policyholders should be able to get the benefit of the policy they purchase even if the vehicle is owned by the government. Why should it matter who owns the other vehicle?

By statute, government-owned vehicles have a cap of $250,000. In some cases that amount may not be enough to compensate someone who is hurt in an accident caused by a government vehicle.

At first blush some may think this provision is meant to save money for state and local governments, it is not. The change does nothing to alter the amount of money the government will pay out. What it does mean is that if someone is seriously injured by a government vehicle and has damages over $250,000, they will not have access to their own underinsured motorist coverage. If someone has purchased underinsured motorist coverage there is no good reason that person should not have access to their own policy that they paid for.

We do know of instances where insurance companies have attempted to define UM or UIM coverage by excluding coverage for a government-owned vehicle. Courts have held this violates public policy. (*Wravnovsky v. Travelers Ins., et al.)*

A representative sampling of decisions from other states that have invalidated the government-owned vehicle exclusion in various jurisdictions in the context of underinsured motorist coverage is as follows:

Minnesota: *Ronning v. Citizens Security Mutual Insurance Company*. In this decision, Minnesota law mandated compulsory underinsured motorist coverage. There was no exception for government owned vehicles in the statute. The court stated that a majority of states have ruled on this issue and found such exclusions to be unlawful restrictions on mandatory coverage required by statutes. The court concluded, "We agree with the reasoning behind these decisions, and hold that a government vehicle exclusion in an insurance policy is void as against public policy in the underinsured motorist context."

North Dakota: *Gabriel v. Minnesota Mutual Fire and Casualty*. The court stated, "[w]here statute does not provide for an exemption for governmental vehicles, a court will not rewrite uninsured or underinsured motorist coverage to provide for such an exemption."

Pennsylvania: *Kmonk-Sullivan v. State Farm Mutual Automobile Insurance Company*. In a jurisdiction similar to Wisconsin and involving a statute requiring insurance companies to offer underinsured motorist coverage, the court concluded that:

> Insurers' policy exclusion is contrary [to the statute] because it attempts to withdraw coverage that the legislature required it to offer. We, therefore, agree with the majority of State Appellate Courts that have considered this issue [citations omitted] and conclude that the insurance policy definitions of underinsured vehicle, which excludes government vehicles . . . 'is an unwarranted invasion of the broad coverage required by statute and is, therefore, void.

We believe the proposed change limits the broad definition of underinsured motor vehicle passed by the Legislature earlier this session. There is absolutely no good reason to change current law. In fact, we believe it would be bad policy to exclude this coverage for government-owned vehicles.

Thank you.

Testimony of James Wranovsky
Milwaukee, Wisconsin
February 11, 2010

My name is James Wranovsky. I live in Milwaukee. I would like to tell you why the Legislature should not change the definition of an underinsured motor vehicle to exclude a government-owned vehicle.

On December 5, 2000 I was on my job as a construction electrician for Uihlein Electric and driving a company-owned van when a parking meter checker jeep owned by the City of Milwaukee ran a red light and struck me. The force of the crash knocked my vehicle on its side. I suffered a concussion and injuries to my shoulders, left knee, arms, and neck as a result of the crash. The injuries to my shoulders and knee required surgical repair. The injuries to my shoulder and neck are permanent. I am still receiving treatment for my injuries.

As an electrician for 36 years, the injuries I suffered meant I could no longer lift anything above my head, which made my job impossible. I was 58 years old at the time of the crash and had worked for the same company for 36 years. I was good at my job, but the auto accident ended my worklife before I was ready to retire.

I learned that by law all government-owned vehicles have a capped liability of $250,000. I settled with the City for that amount. But I was not fully compensated for the injuries and income I lost due my inability to work. Another insurance company insured the company-owned van I was driving when the accident occurred. They had additional underinsured coverage, but their policy included a provision that excluded a government-

owned vehicle in its definition of an underinsured vehicle. Since the vehicle that hit me was a city vehicle, the insurance company would not have to pay. There is no sense for that except to give the insurance company an excuse not to pay a claim.

I went to court to challenge that exclusion because I did not think it was right. Here I was injured and the amount of money the city paid me did not compensate me for my injuries. Over three years after my accident, a judge finally ruled that the insurance company's exclusion could not be enforced. The Judge said, "The plaintiff who suffers losses in excess of that which is allowed against the City of Milwaukee under Wisconsin law should not be arbitrarily precluded from further recovery because he happens to collide with a tortfeasor driving a government vehicle. Enforcement of the defendant Travelers' policy under the facts of this would be contrary to the purpose behind underinsured motorist coverage in Wisconsin, and is therefore void." This ruling allowed me to be compensated for my injuries. I have attached a copy of the Judge's decision.

I don't believe the legislature should alter the definition of underinsured motorist coverage to exclude a government vehicle. For someone like me, after my accident the UIM coverage was really needed. And if the legislature changes the current definition of UIM to exclude government vehicles, someone else who is similarly injured would not have the coverage I was able to get. I don't think that would be right.

Thank you.

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
BRANCH 01

James and Gail Wravnovsky,

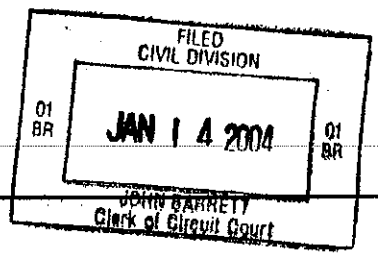
Plaintiffs,

v. Case No. 01CV010955

Travelers Ins., Timothy Dewey,

City of Milwaukee, et al,

Defendants.



DECISION AND ORDER

FACTS

Plaintiff, an electric company worker, was hit by a City of Milwaukee parking checker jeep, while driving in a company van. Plaintiff sued the driver, the City, and The Travelers Indemnity Company of Illinois ("Travelers"), the insurers of plaintiff's van (covered by the electric company). Since the commencement of this suit plaintiff has settled with the driver and the City for $250,000, the maximum amount allowed by statute.

Plaintiff now moves this court for a declaratory judgment stating that the policy issued by Travelers provides uninsured motorist benefits to plaintiff for injuries and damages from the accident because the policy's definition of "uninsured motor vehicle," which excludes vehicles owned by a governmental agency, violates the public policy and statutes of Wisconsin, and is therefore void. Alternatively, plaintiff moves for an order that the policy provides underinsured motorist benefits to plaintiff because the policy's definition of an "underinsured motor vehicle," which excludes vehicles owned by a governmental agency, violates public policy and statutes of Wisconsin. Plaintiff also

seeks an order stating that Travelers' contract be amended to conform to Wisconsin statutes.

Conversely, Travelers moves this court for summary judgment because the driver's vehicle is not an uninsured motor vehicle because it is owned by the City and the plaintiff recovered $250,000, and because the driver's vehicle is not an underinsured motor vehicle because it is a self insured or self funded vehicle owned by a governmental agency and therefore is excluded by the policy. Travelers further argue that even if the driver's vehicle was uninsured or underinsured, plaintiff would not be eligible for coverage because the insurance policy includes a workers compensation exclusion.

PLAINTIFF'S ARGUMENT

Plaintiff argues that he should get uninsured motorist coverage. The jeep driven by the City's employee fits the definition of an uninsured vehicle in the policy; the policy states that a vehicle only has to lack "liability bond or policy" to be an uninsured motor vehicle and there is no dispute that the jeep had neither. The exclusions for self-insured and off road vehicles do not apply here.

Plaintiff also argues that the exclusion for government owned vehicles should be deemed void because it is against public policy. Wisconsin has a strong public policy in favor of compensating victims of uninsured motorists. Drivers who get insurance must also get uninsured motorist coverage. §632.34(4). In the present case, construing the policy to provide coverage supports the rational behind Wisconsin's law requiring uninsured motorist coverage. If the exclusion was deemed void, the plaintiff would be compensated to the extent the plaintiff's employer purchased the uninsured motorist coverage. The exclusion goes against the insured's reasonable expectation. No

Wisconsin courts have dealt with the issue of government owned vehicle exclusion in the context of uninsured motorist coverage. Plaintiff cites numerous cases from other jurisdictions that have discussed the exclusion of coverage for government owned vehicles and states that the "overwhelming majority" of states have invalidated such exclusions.

Plaintiff argues that the exclusion for government owned vehicles conflicts with the mandatory coverage prescribed under §§632.32(3) and (4) and, therefore, the exclusion is void. The effect of the exclusion is to preclude the plaintiff from getting uninsured motorist coverage and that coverage is mandatory in Wisconsin.

In the alternative, plaintiff argues that he is covered by underinsured motorist coverage because the limits of any "applicable liability bonds or policies" have been exhausted. By statute the City could only pay the maximum amount of $250,000, therefore the plaintiff should be able to recover under his underinsured motorist coverage. As with the argument for uninsured motorist coverage, the exclusions for self-insured and off road vehicles do not apply. If the court finds that the City has a "liability bond or policy," then the jeep is not an uninsured motor vehicle and the exclusion does not apply.

Plaintiff again argues that the exclusion for government owned vehicles should be void. Though underinsured motorist coverage is not mandatory in Wisconsin, the legislature has addressed it in §632.32 by stating that an insurer is required to notify insured's of the availability of such coverage and sets monetary limits. The reason insured's get underinsured motorist coverage is to be protected from negligent drivers whose liability limits are insufficient to fully compensate them for their damages. Again,

no Wisconsin court has discussed this issue, and plaintiff cites law from other jurisdictions.

Finally, plaintiff claims that the policy should be amended to make the exclusion for government owned vehicles void. The policy states that Wisconsin law trumps it. If the policy and Wisconsin law conflict, the policy is amended to conform to the statutes. In the present case, the policy conflicts with §632.32(3), (4), (5)(j), and (6)(b) 2a, and, therefore, should be amended to include government owned vehicles.

DEFEDANT'S ARGUMENT

Defendant moves for summary judgment based on the fact that the driver's vehicle is government owned and not covered by the policy. The City's jeep is not an uninsured motor vehicle because the City settled with the plaintiff for the statutory limit. The language of the policy excludes government owned vehicles and the City self-insures its vehicles. The City paid plaintiff $250,000, which is greater than what is required by the Wisconsin Financial Responsibility Act. According to case law for City's jeep to be uninsured it cannot have liability funds at the time of the accident that allows for at least $25,000 per person or $50,000 per accident. By statute the City ha a maximum of $250,000 in available funds, so the jeep is not an uninsured motor vehicle and plaintiff's claim should be dismissed as a matter of law.

Defendant also argues that a self-insured or government owned vehicle is not an underinsured motor vehicle under the policy. According to Wisconsin law, underinsured motor vehicle coverage is not mandatory but if an insurer chooses the coverage it must be at least $50,000 per person and $100,000 per accident. In this case, the policy expressly states that underinsured motor vehicles do not include vehicles owned by government

agencies and vehicles owned by self-insurers. Pursuant to the plain meaning of the policy the City's jeep is not covered. If the policy language is unambiguous, the court should apply it as written. Travelers refers the Court to one of the affidavits of the City and case law developed in unrelated cases for the proposition that the City identifies itself as a self-insurer and has admitted that fact in prior case. Travelers' definition of underinsured motor vehicle also excludes coverage in this case because the jeep was owned by a government unit and has paid funds up to $250,000. Travelers argues that these exclusions are not prohibited by §632.32(6) and are specifically permitted by §632.32(5)(e).

Travelers next maintain that plaintiff is not entitled to uninsured or underinsured motorist coverage because he is entitled to workers compensation benefits. The policy contains a specific exclusion for workers compensation indicating that such exclusions includes: "Any obligation for which the insured or the insured's insurer may be held liable under any workers compensation, disability benefits, or unemployment compensation or any similar law." Since plaintiff's employer, Uihlein Electric, is required to compensate plaintiff for injuries sustained during the course of his employment, the Travelers argues that the exclusion applies to bar coverage.

Alternatively, if the court finds that plaintiff is entitled to coverage from the Travelers' policy, any benefits awarded should be reduced by the settlement paid by the City ($250,000) and any workers compensation plaintiff has received. Travelers states that Wisconsin Courts have held that the purpose of underinsured motorist coverage is to put plaintiff where he would be if the tortfeasor were insured, but the Courts also allow for payments to be reduced by amounts received from other responsible sources if the

policy clearly states that underinsured motorist recovery will be calculated by combining payments from all sources. Travelers' policy clearly has a reducing clause, and, therefore, any benefits recovered under the policy must be reduced by the City's settlement and any workers compensation awarded.

PLAINTIFF RESPONSE

The City is not a self-insurer under Wisconsin law because it does not meet the statutory requirements. *See* §344.16. A certificate of self-insurance must be obtained by the Secretary of State before something can be described as a self-insurer and the City never applied to be a self-insurer. Though City initially described itself as a self-insured, in a response to a Request to Admit or Deny when asked about the classification, the City admitted it was "not a self-insurer under Wisconsin motor vehicle laws, including Wis. Stat. Sec. 344.16m nor any other state's motor vehicle laws." Plaintiff also argues that it is irrelevant that he recovered $250,000 from the City because it does not change the nature of the City-the City is not a self-insurer under Wisconsin law.

Additionally, plaintiff claims that even if the court finds the City to be a self-insurer the exception is void against public policy because Wisconsin law mandates uninsured motorist coverage. Therefore the policy's attempt to exclude this type of coverage is void. Further, plaintiff reiterates his previous argument that the exclusion against government owned vehicles is also void against public policy.

Concerning Travelers' argument that the policy exclusion for workers' compensation benefits does not apply. This exclusion is contained in "Section II" of the policy, which relates to the liability coverage of the policy, and the liability coverage is not at issue here.

DEFENDANT'S RESPONSE

Plaintiff is not entitled to uninsured motorist benefits because the City is a self-insurer and is not uninsured. The government owned exclusion in Travelers' uninsured motorist endorsement is valid and enforceable. Plaintiff's argument that the exclusion violates his reasonable expectation of coverage is without merit because he was not a party to the insurance contract and has no reasonable expectation of coverage; he is not a named insured. Wisconsin courts have routinely held that employees of corporations are not named insured in commercial auto policies.

Defendant also notes that the extra-jurisdictional law cited by plaintiff is easily distinguishable from Wisconsin law. The cases cited by the plaintiff where the courts held that the exclusion for government owned vehicles was void were states where the statutes do not allow for any exclusion from uninsured motorist coverage, unlike the Wisconsin statutes.

Legal Standards

Wis. Stat. § 802.08. Summary judgment.

> (2) Motion. . . . . The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.
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> (3) Supporting papers. . . . . When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse partys response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial.

Where no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law, summary judgment is proper.[1] Facts of consequence to the merits of the case are deemed material.[2] "A factual issue is 'genuine' if the evidence is such that a reasonable juror could return a verdict for the nonmoving party."[3] The nonmovant has the burden of demonstrating specific facts that establish the existence of elements essential to the case.[4] Moving papers must clearly establish the absence of material fact or the motion for summary judgment must be denied.[5]

Wis. Stat. §632.32 (1) Scope.

> Except as otherwise provided, this section applies to every policy of insurance issued or delivered in this state against the insured's liability for loss or damage resulting from accident caused by any motor vehicle whether the loss or damage is to property or person.

Wis. Stat. §632.32 (3) Required provisions.

> Except as provided in sub. 5, every policy subject to this section issued to an owner shall provide that: (a) Coverage provided to the named insured applies in the same manner and under the same provisions to any person using any motor vehicle described in the policy when the use is for purposes and in the manner described in the policy. (b) Coverage extends to any person legally responsible for the use of the motor vehicle.

Wis. Stats. §632.32(4) Required uninsured motorist and medical coverage.

a. Uninsured motorist.

1. For the protection of persons injured who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, … in limits of at least $25,000 per person and $50,000 per accident.

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[1] *Ruff v. Graziano,* 220 Wis.2d 513, 518, 583 N.W.2d 185 (Ct. App. 1998).
[2] *Sherry v. Salvo,* 205 Wis.2d 14, 18, 555 N.W.2d 402 (Ct. App. 1996).
[3] *Kenefick v. Hitchcock,* 187 Wis.2d 218, 224, 522 N.W.2d 261 (Ct. App. 1994).
[4] *Transportation Co. v Hunziger,* 179 Wis.2d 281, 290-91, 507 N.W.2d 136 (Ct. App. 1993).
[5] *City of Edgerton v. General Casualty Co.,* 184 Wis.2d 750, 764, 517 N.W.2d 463 (1994).

2. In this paragraph uninsured motor vehicle also includes: (a) An insured motor vehicle if before or after the accident the liability insurer of the motor vehicle is declared insolvent by a court of competent jurisdiction. (b) An unidentified motor vehicle involved in a hit-and-run accident.

Wis. Stats. §632.32(4m)

Underinsured motorist coverage. (a) 1. An insurer writing policies that insure with respect to a motor vehicle registered or principally garaged in this state against loss resulting from liability imposed by law for bodily injury or death suffered by a person arising out of the ownership, maintenance or use of a motor vehicle shall provide to one insured under each such insurance policy that goes into effect after October 1,1995, that is written by the insurer and that does not include underinsured motorist coverage written notice of the availability of underinsured motorist coverage, including a brief description of the coverage. An insurer is required to provide the notice required under this subdivision only one time and in conjunction with the delivery of the policy.

Wis. Stats. §632.32(5)(j)

A policy may provide that any coverage under this policy does not apply to a loss resulting from the use of a motor vehicle that meets all of the following conditions:

1. Is owned by the named insured, or is owned by the named insured's spouse or a relative of the named insured if the spouse or relative resides in the same household as the named insured.
2. Is not described in the policy under which the claim is made.
3. Is not covered under the terms of the policy as a newly acquired or replacement motor vehicle.

Wis. Stats. §632.32(6)(b) 2a states:

(6)(b) No policy may exclude from coverage afforded or benefits provided:

...

2a. Any person who is named insured or passenger in or on the insured vehicle, with respect to bodily injury, sickness or disease, including death resulting therefrom, to that person.

THE POLICY OF INSURANCE

Travelers' policy states:

> "Any provision of this Coverage Part (including endorsements which modify the Coverage Part) that is in conflict with a Wisconsin statute or rule is hereby amended to conform to that statute or rule."

UNINSURED MOTORIST COVERAGE

A. COVERAGE - UNINSURED

1. We will pay all sums the insured is legally entitled to recover as compensatory damages from the owner or driver of an uninsured motor vehicle. The damages must result from bodily injury sustained by the insured caused by the accident. The owner's or driver's liability for theses damages must result from the ownership, maintenance or use of the uninsured motor vehicle.

2. We will pay under this coverage only after all liability bonds or policies have been exhausted by judgments or payments....

B. WHO IS INSURED

1. You.
2. If you are an individual, any family member.
   a. Anyone else occupying a covered auto or a temporary substitute for a covered auto. The covered auto must be out of service because of its breakdown, repair, servicing, loss or destruction.

C. ADDITIONAL DEFINITIONS – FROM THE ENDORSEMENT

3. Uninsured motor vehicle means a land motor vehicle or trailer:
   b. For which no liability bond or policy at the time of an accident provides for at least the applicable minimum limit for bodily injury liability specified by WIS. STAT. Section 344.15. The applicable minimum limit is:
      a. $50,000 for each accident if the limit of liability is a single limit that applies for each accident, or
      b. $25,000 for each person/$50,000 for each accident if the limit of liability is indicated as a split limit.

   Uninsured motor vehicle does not include any vehicle:
   a. Owned or operated by a self-insurer under any applicable motor vehicle law other than Wisconsin motor vehicle law, except a self-insurer who is or

becomes insolvent and cannot provide the amounts required by that motor vehicle law;

b. Owned or operated by a self-insurer under Wisconsin motor vehicle law, except a self-insurer who is or becomes insolvent and cannot provide at least $50,000 for each accident, which is the minimum combined single limit of liability specified by WIS.STAT. Section 344.15;

c. Owned by a governmental unit or agency;

d. Designed for use mainly off public roads while not on public roads; or

e. That is an underinsured motor vehicle.

UNDERINSURED MOTORIST COVERAGE

1. We will pay all sums the insured is legally entitled to recover as compensatory damages from the owner or driver of an underinsured motor vehicle. The damages must result from bodily injury sustained by the insured caused by an accident. The owner's or driver's liability for these damages must result from the ownership, maintenance or use of the underinsured motor vehicle.
2. We will pay under this coverage only if a. or b. below applies:
   a. The limit is of any applicable liability bonds or policies have been exhausted by judgments or payments; or
   b. A tentative settlement has been made between an insured and the insurer of the underinsured motor vehicle and we:
      1. Have been given prompt written notice of such tentative settlement; and
      2. Advance payment to the insured in an amount equal to the tentative settlement within 30 days after receipt of notification.
3. Any judgment for damages arising out of a suit brought without written consent is not binding on us.

C. WHO IS INSURED (SAME AS ABOVE)

D. ADDITIONAL DEFINITIONS – AS USED IN THIS ENDORSEMENT

3. Underinsured motor vehicle means a land motor vehicle or trailer:
   a. For which the sum of all liability bonds or policies at the time of an accident provides for at least the applicable minimum limit for bodily injury liability specified by WIS. STAT. Section 344.15. The applicable minimum limit is:
      a. $50,000 for each accident if the limit of liability is a single limit that applies for each accident, or

b. $25,000 for each person/$50,000 for each accident if the limit of liability is indicated as a split limit.

UNDERINSURED MOTOR VEHICLE DOES NOT INCLUDE ANY VEHICLE:

a. Owned or operated by a self-insurer under any applicable motor vehicle law.
b. Owned or operated by a governmental unit or agency.
c. Designed for use mainly off public roads while not on public roads; or
d. That is an uninsured motor vehicle.

ANALYSIS

ISSUE #1: WHETHER EXCLUSION OF COVERAGE UNDER TRAVELERS' DEFINITION OF UNINSURED MOTORIST COVERAGE IS VALID

In this case there is no dispute that the vehicle causing injury to the plaintiff is a governmental vehicle owned by the City of Milwaukee and operated by its employee. There is also no dispute that the City has conceded liability in this case and has paid the statutory limit of $250,000 for the injuries to the plaintiffs in this case. Further there is no dispute that the plaintiff was employed by the a company whose commercial fleet of vehicles were insured by defendant Traveler's and that the plaintiff driver was one who routinely drove his employer's vehicle.

The dispute in this case is over the interpretation and application of exclusions in the defendant Traveler's policy in this case. The statutory examination of the issue of whether Travelers' policy has a valid uninsured motorist exclusion begins with consideration of §632.32(5)(e) which provides that: "A policy may provide for exclusions not prohibited by sub (6) or other applicable law. The Wisconsin Court has a two-part test; first, 632.32(6) is applied to decide whether the exclusion fits the description of any of the enumerated prohibitions; if so, it is resolved, and the exclusion is invalid.[6] If not,

[6] Clark v American Fam, 218 Wis.2d 169, 174, 577 N.W.2d 790 (1998).

resolved, the second part of the test requires examination of other applicable law. Whether Travelers' exclusion is prohibited by "other applicable law" is at center of the dispute in this case.

The parties dispute coverage under the uninsured theory. That is, can the plaintiff driver who has recovered more than the prescribed statutory requirements under Wisconsin's uninsured motorists provision, recover from defendant Traveler's under a policy of insurance which will pay only for damages resulting from the use of an "uninsured vehicle" which DOES NOT include in the policy's definition of uninsured a vehicle that is covered by a "liability bond or policy," a vehicle owned or operated by a governmental unit or a vehicle which is self-insured under Wisconsin's motor vehicle law.

The record in this case demonstrates that the City of Milwaukee has conceded that it does not meet the statutory requisites of a self-insure under Wisconsin motor vehicle law as that term is described in §344.16. The City recites that it has never filed nor does it have a certificate of insurance on file with the Wisconsin Secretary of State and is therefore not recognized by state law or any regulatory agency of the state as a self-insurer. The record discloses that although it has used the terminology "self-insured" in describing its compensation to accident vistims, it does not maintain reserve funds for claims that are filed and makes no filings to declare itself as a self-insuring entity. Payment of the City's claims such as the ones in this case result from common council resolution and budget approrpriation – not self-insurance.

In this case, regardless of the characterization of the City as self-insured or not, or as having funds available to compensate the torts of its agent, the result is that the

plaintiff has been compensated in excess of the minimum limits for bodily injury applicable under Wisconsin law. Because the City has paid the plaintiffs more than the Wisconsin uninsured motorist limits, the defendant argues – among other reasons – that the plaintiff's vehicle was not uninsured.

Section 632.32(4)(a) requires every vehicle liability policy in Wisconsin to include uninsured motorists coverage in limits of at least $25,000.00 per person and $50,000 per accident. The legislative purpose of this section was to ensure that the injured party had an opportunity to recover the minimums generally available in the insured "marketplace."[7] The additional definition section of the endorsement to the policy provides that an uninsured motor vehicle is one for which **no liability bond or policy** exist. When this particular provision in this policy is read together with the legislative intent drawn from §632.32(4)(a), it is clear that the plaintiff has received the benefit of the applicable minimums under Wisconsin law. By Wisconsin Statute §345.05(3), the City of Milwaukee is required to provide $250,000 per person for any damages, injuries or death in any action involving its motor vehicles. The funds having been made available by the City in this case in a sum which exceeds the limits specified in Wis. Stat. §344.15, refutes the application of the uninsured motorists provisions under defendant's Traveler's policy. Under this analysis the Court construes the City's payment of the limits under §345.05(3) as evidence sufficient to meet the legislative purposes of the uninsured mandates of §632.32(4). Therefore, enforcement under the circumstances and facts of this case does not offend Wisconsin's public policy or the intent of the legislature in ensuring that injured persons receive a minimum amount of coverage.

[7] State Farm Mut. Auto., v Gillette, 246 Wis.2d 561, 630 N.W.2d 527, 532 (Wis.Ct. App. 2001), aff'd, 251 Wis.2d 561, 641 N.W. 2d 662 (Wis. 2002), citing , Hull V. State Farm Mutual, 222 Wis.2d 627, 644-45, 586 N.W.2d 863 (Wis. 1998).

ISSUE #2: WHETHER EXCLUSION OF COVERAGE UNDER TRAVELERS' DEFINITION OF UNDERINSURED MOTORIST COVERAGE IS INVALID AND VOID

The Court having concluded that the defendant Travelers' policy exclusion for uninsured motorist coverage in this case is valid and enforceable, relying heavily on the fact that the legislatively prescribed minimum limits under §344.15 have been paid in this case, must now assess the application of the Travelers' policy to the City's vehicle for the purpose of underinsured motorist coverage. Travelers' policy states that it will pay under the policy only if the limits of any applicable liability bonds or policies have been exhausted by judgments or payments. No one argues that the limits of the City's statutory obligation have not been paid. Rather, Travelers' position is that coverage is excluded because the City's jeep was self-insured, uninsured and owned by a governmental unit. Travelers argues that either of these three reasons operate to preclude coverage in this case under the underinsured provisions of the policy. The Court in the above section has already concluded from the record in this case that the City is not self-insured under the requisites of Wisconsin's motor vehicle law and is not uninsured. The Court now examines the policy's exclusion based on the "government owned and operated vehicle" provision.

The purpose of underinsured motorist coverage is to compensate an insured accident victim when the insured's damages exceed the recovery from the at-fault driver (or other responsible party)."[8] "According to this theory, underinsured motorist coverage operates as a separate fund, available for the payment of the insured's uncompensated

[8] Badger, 2002 WI 98 p. 17 (Citations omitted)

damages."[9] "The insured purchases coverage for his or her damages in a set dollar amount above and beyond the liability limits of the at-fault driver."[10] The plaintiff's employer purchased a $1,000,000.00 to protect its employees from accidents. However, the policy exclusion in this case protects only those employees of Travelers who happen to be fortunate enough to suffer bodily injury or death from a NON-government owned vehicle.

Under Wisconsin law exclusions are permitted as long as such exclusions are not prohibited by §632.32(6) or other applicable law. In this case, defendant Travelers' policy excludes two types of vehicles from the definition of underinsured motor vehicle – a vehicle owned or operated by a self-insurer under the applicable motor vehicle law and a vehicle owned by a governmental unit or agency.

There is no appellate law on this issue from Wisconsin courts. However, the plaintiff has provided this Court with several cases from other jurisdictions with compelling and convincing holdings that such clauses violate public policy when such clauses eliminate coverage simply because the party was injured by a government owned vehicle.[11]

For example, in a Pennsylvania case where the court required insurance companies to offer underinsured coverage, the court concluded that:

> Insurers' policy exclusion is contrary [to the statute] because it attempts to withdraw coverage that the legislature required it to offer. [Citations omitted]. We therefore, agree with the majority of State Appellate Courts

[9] Id. 3 Irwin E. Schermer, Automobile Liability Insurance §57.01, at 57-2 (3d ed. 1995).
[10] Id. citing Taylor v. Greatway Ins. Co., 2001 WI 93, p. 32 245 Wis.2d 134, 628 N.W.2d 916 (Bradley, J., dissenting).
[11] See Ronning v. Citizens Security Mutual Ins Company, 557 N.W.2d 363 (Minn. App. 1996); Gabriel v Minnesota Mutual, 506 N.W.2d 73, 76 (N.D. 1993); Kmonk-Sullivan v. State Farm Mutual, 788 A.2d 955 (Pa. 2001);

> that have considered this issue [citations omitted] and conclude that the insurance policy definitions of underinsured vehicle, which excludes government vehicles ... is an unwarranted invasion of the broad coverage required by statute and is, therefore, void.[12]

The rationale offered in this case equally applies to the facts before this Court. Essentially, the plaintiff in this case is restricted in the amount of available coverage because Wisconsin law provides a limit on recovery from municipalities such as Milwaukee. The plaintiff who suffers losses in excess of that which is allowed against the City of Milwaukee under Wisconsin law should not be arbitrarily precluded from further recovery because he happens to collide with a tortfeasor driving a government vehicle. Enforcement of defendant Travelers' policy under the facts of this would be contrary to the purpose behind the underinsured motorist coverage in Wisconsin, and is therefore void. Additionally, the application of the government-owned exclusions in this case has the effect of prohibiting underinsured motorist coverage inconsistent with the dictates of §632.32(6). And finally, the defendant Travelers' "conformity to statute or rule" language does not save it from conflict with Wisconsin statutes or Wisconsin public policy. Plaintiff is correct; Travelers' should not be allowed to do indirectly that which it is prohibited from doing directly – using the government owned vehicle exclusion to punish the injured plaintiff for circumstances beyond his control or knowledge. Such an exclusion goes against §632.32, including subsections (3), (4), (5)(j) and (6)(b)2a, and the legislative intent contained therein.

[12] Id. at 962. (Citing Hillhouse v. farmers Ins. Co., 226 Kan. 68, 595 P.2d 1102, 1103-1104 (1979).

ISSUE #3: WHETHER COVERAGE IS PROHIBITED UNDER WORKERS' COMPENSATION LAW

The Court having reviewed the briefs and considered the oral arguments of counsel and the law concludes that the issue of worker's compensation seems to be moot in this case since the record shows that that lien was repaid pursuant to §102 when plaintiff settled his claim with the City.

ISSUE #4: WHETHER TRAVELER'S REDUCING CLAUSE IS VOID AND UNENFORCEABLE

Travelers argues that "in the event the plaintiff recovers uninsured or underinsured benefits, …those benefits would nonetheless be reduced by the amount of settlement proceeds the [plaintiff] received from the City [and] worker's compensation. Plaintiff correctly notes that it is unclear what effect Travelers is suggesting that a reducing clause has on the plaintiff's case. This decision assumes that Travelers would be claiming that it would reduce the amount of plaintiff's coverage, not the damages plaintiff can recover.

In such a case as this, the Wisconsin law in §632.32(5)(i) allows insurers to reduce underinsured motorist coverage by three specific sources including: (1) amounts paid by or on behalf of any person or organization that may be legally responsible for the bodily injury… for which the payment is made; (2) amounts paid or payable under any worker's compensation law; and (3) amounts paid or payable unde any disability benefits laws.

The reducing clause in Travelers' policy states:

2. The Limit of insurance under this coverage be reduced by:

a. All sums paid or payable under any workers' compensation, disability benefits or similar law, and

b. All sums paid by or for anyone who is legally responsible …

The Wisconsin statute does not permit reduction of benefits payable under any "similar law." Therefore since a portion of travelers' reducing clause is not clear and is ambiguous, and exceeds the scope of §632.32(5)(i), the entire reducing clause is rendered void.[13]

Wisconsin courts have specifically required exactness, and not "broad unauthorized language.[14] Wisconsin courts have required reducing clauses to clearly inform insureds of the level of underinsured motorist coverage actually purchased. These principles were furthered clarified in a recent case in which a Wisconsin court highlighted that the reducing clause must be "crystal clear within the context of the whole policy.[15] Otherwise, if the language in not clear, the policy is deemed ambiguous and the reducing clause is unenforceable.[16] In this case, there are various contradictory provisions including the language cited from the policy above, the declarations page which mentions uninsured and underinsured without much, the lack of definitions for terms such as underinsured motorist, endorsement or reducing clause, and the lack of notice to the insured that the uninsured and underinsured motorist coverage may differ between the policy itself and the declarations page. These are the types of inconsistencies in Travelers' policy that Wisconsin courts have used to render reducing clauses unenforceable,; and the Court so orders in this case.

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[13] See Hanson v Prudential Prop., 2002 WI 275, 258 Wis.2d 709, 653 N.W.2d 915 (Ct. App. 2002)
[14] Id. at 29.
[15] Badger v Schmitz, 2002 WI 98, 46, 255 Wis.2d 61, 647 N.W.2d 223 (2002).
[16] Id. at 49.

Order

Based on the record, briefs and arguments of the parties in this case, Wisconsin statutes, and the law, this Court concludes as follows:

1. That Travelers' motion for declaratory judgment is denied.
2. That Travelers' policy's reducing clause is void and unenforceable under Wisconsin law.
3. That plaintiff's motion for declaratory judgment is granted based on the Court's finding that the defendant Travelers' policy, which excludes underinsured motorist coverage is prohibited by Wisconsin law, against Wisconsin public policy, and is therefore unenforceable and void.
4. That plaintiff's motion for declaratory judgment based on the uninsured motorist coverage is denied.
5. That Travelers' policy is hereby amended to conform to Wisconsin law.

Dated at Milwaukee, Wisconsin this 14th day of January 2004.

BY THE COURT:

Judge Maxine Aldridge White
Circuit Court Judge